



Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

September 22, 2004

Re: WCB Docket Nos. 96-98, 99-68

Dear Ms. Dortch:

The Association for Local Telecommunications Services (ALTS) hereby submits a response to prior filings in the above-referenced dockets regarding the Commission's pending proceeding on remand of the Commission's intercarrier compensation regime for Internet Service Provider (ISP) – bound traffic. ALTS urges the Commission to conclude that ISP-bound traffic fits squarely within the parameters of section 251(b)(5)¹ of the Act. ALTS further urges that the Commission conclude that state commissions are the proper arbiters of rates for ISP-bound traffic. If the Commission chooses instead to maintain its interim federal rate for such traffic, ALTS respectfully submits that the Commission must prevent state commissions from interfering with the Commission's authority to ensure application of the federal regime to so-called VNXX/FX traffic.

First, the Commission must conclude that ISP-bound traffic fits squarely within the parameters of section 251(b)(5) of the Act. The Commission's prior decisions excluding such traffic from section 251(b)(5) as non-local traffic², and its efforts to use section 251(g) to justify treating ISP-bound traffic as different from similar telecommunications traffic, have both been soundly rejected by the D.C. Circuit.³ The D.C. Circuit concluded that the fact that ISP calls are jurisdictionally interstate does not mean they do not fall within section 251(b)(5).⁴ The court further concluded that ISP-bound traffic is not subject to any pre-Act obligation, pursuant to section 251(g), that

¹ 47 U.S.C. § 251(b)(5).

² *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

³ Indeed, even SBC concedes that "[s]ome language in the D.C. Circuit's *WorldCom* decision can be read to suggest that section 251(g) itself does not justify excluding ISP-bound traffic from the scope of section 251(b)(5)." SBC Sept. 13 Letter at 4 n.10. SBC's suggestion that only "some language" in the order stands for this proposition is somewhat optimistic. The actual language from the Court's decision is: "we find the Commission's reliance on § 251(g) precluded." *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 430 (D.C. Cir. 2002).

would exempt ISP-bound traffic from section 251(b)(5) reciprocal compensation.⁴ Section 251(b)(5) of the Act requires that all local exchange carriers “establish reciprocal compensation arrangements for transport and termination of telecommunications.” The duty established by section 251(b)(5) of the Act applies to all telecommunications, including calls delivered to an ISP. In the *ISP Remand Order*, the Commission correctly acknowledged the broad scope of section 251(b)(5) of the Act: “[o]n its face, carriers are required to establish reciprocal compensation arrangements for transport and termination of all telecommunications they exchange with another telecommunications carrier, without exception.”⁵ As such, the applicability of section 251(b)(5) to ISP-bound telecommunications traffic is clear.

Even the Intercarrier Compensation Forum (ICF) has warned the Commission not to conclude that ISP-bound traffic falls outside the scope of section 251(b)(5). Specifically, the ICF cautioned that the Commission “should not rely on a theory that particular categories of traffic are beyond even the potential scope of section 251(b)(5). Such a finding could complicate the Commission’s efforts to use that provision later to exercise jurisdiction”⁶ The ICF notes that its plan “does not call for an immediate shift to bill and keep for ISP-bound traffic.”⁷ It is clear, therefore, that the Commission cannot unduly prejudice its upcoming omnibus intercarrier compensation proceeding by concluding that ISP-bound traffic falls outside of section 251(b)(5).

As the D.C. Circuit recognized, the classification of Internet-bound traffic as jurisdictionally interstate does not mean that such traffic is not subject to section 251(b)(5) of the Act. Specifically, section 251(i) of the Act preserves the Commission’s authority over interstate telecommunications services. Section 251(i) provides that: “[n]othing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.”⁸ As SBC notes, “the Commission’s authority under section 201 of the Act, as preserved by section 251(i),” provides ample basis for the Commission to continue to assert its authority over Internet-bound traffic, even while the Commission necessarily concludes that ISP-bound traffic is subject to the requirements of section 251(b)(5) of the Act.⁹ ALTS agrees that the FCC has authority to conclude that ISP-bound traffic, while clearly subject to section 251(b)(5) of the Act, also falls within the FCC’s legacy jurisdiction under section 201 of the Act because of the grandfathering

⁴ *WorldCom*, 288 F.3d at 433.

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd 9151 (rel. Apr. 27, 2001), *remanded without vacatur*, *WorldCom, Inc. FCC*, 288 F.3d 429 (D.C. Cir. 2002) at ¶ 31 (“*ISP Remand Order*”).

⁶ See Letter from Gary Epstein, Counsel, Intercarrier Compensation Forum, to Marlene Dortch, Secretary, FCC, WCB Docket No.s 96-98 and 99-68, at 1 (Sept. 13, 2004).

⁷ ICF Sept. 13 Letter at 2 n.3.

⁸ 47 U.S.C. § 251(i). See also H.R. Conf. Rep. No. 458, 104* Cong., 2d Sess. at 116 (1996) “New subsection 251(i) makes clear the conferees’ intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission’s existing authority regarding interconnection under section 201 of the Communications Act.”

⁹ See Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC, to Marlene Dortch, Secretary, FCC, WCB Docket Now. 96-98 and 99-68, at 3 (Sept. 13, 2004).

provisions of section 251(i) of the Act.¹⁰ While ALTS believes that ISP-bound traffic should be treated the same as all other 251 (b)(5) traffic, such jurisdiction would permit the FCC to maintain an interim federal pricing regime for ISP-bound traffic while it develops a unified compensation regime for all intercarrier traffic. Such a holding would ensure that the Commission continues to assert its jurisdiction over Internet traffic.¹¹

To the extent SBC and other Bell companies call for a mandatory bill and keep regime pursuant to the Intercarrier Compensation Forum (ICF) recently minted proposal, such issues are, as SBC itself suggests, better resolved when the Commission solicits further comment on all recent intercarrier compensation reform proposals submitted to the FCC. SBC recently informed the Commission that, as to bill and keep proposals, the “ICF will address this and other issues relating to sections 251(b)(5) and 252(d)(2) in subsequent filings.”¹² ALTS will submit a timely response to such filings when the Commission solicits comment.

Second, should the Commission retain jurisdiction to set rates for ISP-bound traffic, the Commission must ensure that state commissions do not interfere with this federal pricing regime by setting unlawful terms and conditions for ISP-bound traffic. In particular, the Commission must make clear that the physical location of the ISP is irrelevant to the issue of whether reciprocal compensation is due under section 251(b)(5). – no exception is made for ISP-bound calls terminated via VNXX/FX arrangements (regardless of whether employed by an ILEC or CLEC).¹³ In VNXX/FX arrangements, a LEC assigns a telephone number normally associated with one ILEC local calling area to a customer physically located in another “distant” ILEC area in order to give the customer a “local presence” in the “distant” area. Such arrangements are typically used by ISPs to provide customers a “local” phone number for dial-up access to the Internet, even where an ISP cannot as a practical or technical matter have a point of presence (POP) in every local calling area in the country.¹⁴ Consumers are the obvious beneficiaries of such practice, because it allows widespread access to the Internet in rural

¹⁰ The Commission has long held that ISP-bound traffic is local in nature and interstate in jurisdiction. *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 99-68), Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (rel. Feb. 26, 1999), *vacated and remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) at ¶ 23 (“*ISP Declaratory Ruling*”).

¹¹ Maintenance of such a federal pricing regime requires the Commission to immediately eliminate mechanisms that have operated to prevent carriers from actually obtaining compensation under that regime; namely, the so-called growth cap and new market rules. Such regimes are arbitrary and never served any valid purpose, and maintaining them would interfere with the Commission’s ability to establish a unified national compensation regime for ISP-bound traffic.

¹² SBC Sept. 13 Letter at 5.

¹³ *See, e.g., ex parte* presentation by XO Communications, KMC Telecom, and Xpedius, WCB Docket Nos. 96-98 and 99-68 (Sept. 9, 2004).

¹⁴ Indeed, it would be incredibly inefficient for any carrier – ILEC or CLEC – to force its ISPs customers to establish a point of presence in every single central office in the country in order to serve end users. No ISP could afford to do so, and indeed, no efficient network design would contemplate such an architecture. Yet that is the very network arrangement that this Commission will force on ISPs if it does not expressly overturn those state commissions that have ruled against VNXX/FX arrangements.

and other areas of the country where prohibitively expensive toll calls would be the only means for such access.

Regardless of the physical location of an ISP's equipment or its mailing address, ISP-bound calls exchanged between LECs are not excepted from section 251(b)(5) reciprocal compensation. If the Commission determines that ISP-bound traffic is interstate and thus within the Commission's jurisdiction, it may decide to maintain the federal rate it has already set for such traffic. If the Commission elects to preserve a federal rate, ALTS urges the Commission to take the necessary steps to ensure that the federal rate is actually implemented by the states. In particular, the FCC must conclude that certain state decisions regarding so-called "foreign exchange traffic" that is ISP-bound conflict with the FCC's federal rate regime for ISP-bound traffic. Specifically, the Commission must conclude that its treatment of ISP-bound traffic here, as under the ISP Remand Order, is not limited to situations where the ISP server is physically located within the geographic local calling area of the end user originating the call.¹⁵ In addition, state commission decisions that purport to impose intrastate access charge regimes on such traffic must not be permitted to stand, given their obvious conflict with assertion of federal interstate jurisdiction over such traffic. In short, the Commission must make clear that its determinations regarding intercarrier compensation for ISP-bound traffic are based on the nature of that traffic, not on the physical location of the server. Because the FCC has authority, pursuant to sections 201, 251(b)(5) and 251(i) of the Act, to set the rate for ISP-bound traffic, states have no authority to determine that intrastate access charges apply to such traffic. The states do, however, retain authority to arbitrate interconnection agreement disputes between carriers.

In addition, the ICF recently cautioned the Commission not to conclude that the scope of section 251(b)(5) is defined by the local calling area within which traffic originates and terminates. Specifically, the ICF noted that "[s]uch a narrow view of the statute . . . could needlessly compromise the Commission's efforts to complete comprehensive intercarrier compensation reform in a timely, efficient and administrable manner."¹⁶ Not only should the Commission take the steps proposed by the ICF to avoid interference with future action on intercarrier compensation reform, it must also ensure that the states do not interfere with such action by, for example, asserting jurisdiction over ISP-bound traffic that is clearly within the FCC's ambit. State commission decisions applying intrastate access charges, or otherwise denying interstate intercarrier compensation, to ISP-bound traffic, regardless of where that traffic originates, risk "perpetuating differing rate regimes for particular categories of IP-enabled and other calls."¹⁷ As such, the Commission should "take great care not to constrict its future authority over intercarrier compensation"¹⁸ and must take affirmative steps to prevent state commissions from overriding the Commission's clear authority.

¹⁵ An ISP typically collocates its server at the switch site of its serving LEC. When the ISP changes LECs, it moves its server to the switch site of the new LEC. Cf. *Starnet, Inc., v. Global NAPS, Inc.*, 355 F.3d 634 (7th Cir. 2004) (noting that the distinction between "service provider portability" and "location portability" is blurred when service to an ISP is concerned).

¹⁶ ICF Sept. 13 Letter at 3.

¹⁷ *Id.*

¹⁸ *Id.*

Respectfully submitted,

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